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<b>D.P., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 17-0290</b>
	)	<b>Issued: May 14, 2018</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Mission Viejo, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On November 11, 2016<sup>1</sup> appellant filed a timely appeal from a May 20, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of October 20, 2015 to the filing of this appeal, pursuant to

<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from May 20, 2016, the date of OWCP's decision, was November 16, 2016. Since using November 21, 2016, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 11, 2016, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On March 24, 2015 appellant, then a 57-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that he experienced lower back pain on March 19, 2015 after he stepped down from his long life vehicle (LLV), and loaded and delivered mail. He stopped work on March 19, 2015.

Several duty status reports (Form CA-17) documenting a lumbar strain/sprain were submitted by Dr. Hosea Brown III, Board-certified in internal medicine. In an April 27, 2015 development letter, OWCP advised appellant of the deficiencies in his claim and requested that he submit additional factual and medical evidence, including a rationalized report from his physician which explained how the events of March 19, 2015 caused or contributed to a diagnosed condition. It also requested that he complete a questionnaire. Appellant was afforded 30 days to submit the requested information.

Appellant provided a May 8, 2015 response to OWCP's development questionnaire and an April 28, 2015 duty status report which diagnosed a lumbar strain/sprain.

By decision dated May 28, 2015, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the diagnosed medical condition was causally related to the accepted work event. It found that there was no physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition.

On July 30, 2015 appellant requested reconsideration.

In a March 20, 2015 report, Dr. George T. Ricks, a family practitioner, noted that appellant reported low back pain due to stepping on uneven stairs. He noted that appellant had a work-related low back injury four years ago, when he lifted a heavy tray. Dr. Ricks diagnosed a traumatic lumbar spine sprain/strain. He additionally noted that lumbar discopathy and radiculopathy needed to be ruled out.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence following the May 20, 2016 decision on appeal. The Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision. Therefore, the Board is precluded from considering this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

A June 2, 2015 magnetic resonance imaging (MRI) scan, was interpreted as showing severe stenosis of the left neural foramen, moderate-to-severe stenosis of the right neural foramen, and moderate stenosis of the left lateral recess.

Medical reports and duty status reports from Dr. Brown dated May 14 and 28, June 11, and July 30, 2015 were also received. In his reports, Dr. Brown reported that on March 19, 2015 appellant was in the process of performing residential mail delivery when, upon exiting from his LLV and stepping onto the slope of a driveway at a residence, he experienced a sudden onset of severe pain and discomfort in his low back. Appellant's pain and discomfort in his lower back progressively worsened and he reported the injury the following day, March 20, 2015. On March 20, 2015 he presented to his office for treatment. Dr. Brown diagnosed lumbar spine sprain/strain and ordered diagnostic studies to rule out herniated lumbar disc and rule out lumbar radiculitis. In his June 11, 2015 report, he opined that, after obtaining the history of injury, performing physical examination and analyzing available diagnostic data, appellant's medical injury to his low back was a direct result of the March 19, 2015 traumatic incident. Dr. Brown indicated that appellant's description of back pain, findings on physical examination, and the MRI scan were indicative of both herniated lumbar disc and lumbar radiculitis. He explained that the biomechanical mechanism applicable in this traumatic incident was clear as the immediate complaint of pain while stepping down and dismounting from his LLV indicated the temporal sequence of an acute herniated lumbar disc with lumbar radiculitis. Dr. Brown explained that it was an established medical fact that a sudden stepping down onto a hard surface could precipitate an acute herniated disc with neurological compromise manifesting as low back pain with radiation of pain into the left lower extremity.

By decision dated October 20, 2015, OWCP denied modification of its May 28, 2015 decision. It found that the medical evidence submitted was not well rationalized or based on a complete factual history which addressed whether appellant had sustained an injury on March 19, 2015 or at some time period in the past. OWCP noted that, while the conditions diagnosed usually develop over time, no medical opinion was provided to explain the development of the condition as it related to the accepted March 19, 2015 employment incident. It further noted that no medical evidence was provided which indicated treatment had been received for lumbar intervertebral disc syndrome and lumbar radiculitis, conditions which develop over a period of time and are attributable to the aging process, gradual deterioration, and wear and tear as opposed to an injury occurring on one business day.

On April 1, 2016 OWCP received appellant's March 10, 2016 request for reconsideration. Evidence previously of record was submitted along with new medical evidence.

In a March 10, 2016 report, Dr. Brown stated that he disagreed with OWCP's May 28, 2015 denial of appellant's reconsideration request. He opined that appellant's lumbar intervertebral disc syndrome with myelopathy and lumbar radiculitis conditions were acute conditions which occurred as a direct result of the March 19, 2015 traumatic event and that OWCP's assertion that the conditions diagnosed usually develop over time was false. Dr. Brown indicated that, on March 19, 2015, appellant was in the process of performing residential mail delivery when, upon exiting from his LLV postal vehicle, he dismounted and stepped on the slope of a driveway, whereupon he immediately felt the sudden onset of severe pain and discomfort in his low back. He stated that this traumatic event was not a repetitive type of injury, as OWCP

previously indicated. Rather, the biomechanical maneuver of stepping down and dismounting from LLV precipitated and caused an acute herniation of the intervertebral disc at L5-S1. This acute herniation was documented on the June 2, 2015 MRI scan study, which revealed evidence of a five-millimeter diffuse disc bulge at that level, which encroached upon the left neuroforamen causing severe stenosis of the left neuroforamen and moderate-to-severe stenosis of the right neuroforamen. Dr. Brown indicated that appellant experienced severe pain and discomfort in his lower back continuously from the March 19, 2016 traumatic event. The MRI scan documented herniated disc, which was consistent with appellant's complaints of severe back pain with radiation of his pain into both lower extremities. The fact that appellant was experiencing radiation of his pain into both lower extremities was consistent with lumbar radiculitis and with encroachment of the intervertebral disc at the L5-S1 level upon the spinal cord which caused a myelopathy and had manifested as severe pain and discomfort upon ambulation and associated with numbness and tingling in his lower extremities. Dr. Brown indicated that OWCP's assertion that appellant's condition was a "repetitive[-]type injury" was inconsistent with the medical facts and indicative of an opinion rendered by nonmedical personnel. He further indicated that, while appellant currently worked six-to-seven hours daily within restrictions, he continued to be symptomatic and exhibited residual symptomatology from the March 19, 2015 traumatic event. Duty status reports from Dr. Brown dated October 29 and December 29, 2015 and March 10, 2016 were also received.

By decision dated May 20, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that Dr. Brown's letter was cumulative of his earlier reports and that he restated the same arguments previously considered in his reports dated March 20, May 28, June 11, and July 30, 2015. Furthermore, none of the reports addressed the previously claimed back conditions which dated back to at least 2008 when appellant claimed back problems in OWCP File No. xxxxxx347.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>6</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

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<sup>4</sup> Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

## ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review.

The underlying issue in this case is whether appellant has submitted sufficient evidence relevant to the issue of causal relationship of his back conditions. This is a medical issue. In its October 20, 2015 decision, OWCP denied the claim as there was no medical evidence which addressed whether appellant had sustained an injury on March 19, 2015 or at some time period in the past. It further found that no medical evidence was provided which indicated that past treatment had been received for lumbar intervertebral disc syndrome and lumbar radiculitis.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. He did not otherwise elaborate regarding the particular basis for requesting reconsideration. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>8</sup>

Appellant's request for reconsideration was accompanied by a new report from Dr. Brown dated March 10, 2016. As noted the underlying issue is whether appellant submitted sufficient medical evidence based on a complete factual and medical history to establish that his back condition was causally related to the accepted work event of March 19, 2015. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case.<sup>9</sup> Dr. Brown's March 10, 2016 report is substantially similar to his earlier report of June 11, 2015. Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.<sup>10</sup> Because appellant did not provide OWCP with any relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>11</sup>

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law not previously considered by OWCP. It also failed to provide any relevant and pertinent new evidence. Accordingly, the Board finds that OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits in its October 20, 2015 decision.

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<sup>8</sup> 20 C.F.R. § 10.606(b)(3)(i) and (ii).

<sup>9</sup> See *B.D.*, Docket No. 16-1177 (issued October 27, 2016).

<sup>10</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>11</sup> 20 C.F.R. § 10.606(b)(3)(iii).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 20, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board